In the matter of the application to register the land known as Wellington Hill Playing Field as New Town or Village Green.

Response to the Council's Statement of Objections

Dear Sirs

This letter is lodged on behalf of the Applicants in the above matter and is in response to the letter of objection ("LOB") dated the 27th May 2011 lodged by Mrs D Leamon on behalf of the Director of Central Support Services of Bristol City Council ("the Council").

Introduction

1. As an initial point the Council ask that the officer for the Commons Registration Authority ("CRA") agree to a hearing of the issue of whether the use of the playing field has been "by right" ("BR") or "as of right" ("AOR"). They seek this as it will, they claim, save them costs and time. This presupposes that the application will be successful, because if it is not then the cost to the Applicants will have increased and the time taken to reach a final conclusion will have been greater. If the CRA determine that the use has been AOR then there will need to be a subsequent hearing and this will increase the overall costs to the Applicants who are essentially funded by a voluntary organisation comprised of local people without funding, unlike the Council. This is an abuse of process by the Council, with the intention of outspending an Applicant.

2. The evidence we have supplied is abundant that the use has been as of right. Please see the hundreds of statements which we submitted with the application. What is the purpose of the proposed hearing – is the Council assuming that these hundreds of people who have submitted written statements will respond under cross-examination that in fact their statements were false? We would therefore ask that the CRA determine not to hear this as a preliminary issue but give directions to enable the matter to be brought to a speedy conclusion when all objections can be considered and a determination made.

3. The Applicants therefore request that the CRA direct as follows:-

    I. That the issue of whether the use is BR or AOR is not dealt with independently of the other issues but all objections are heard together.

    II. That the Council be directed to file their other objections in full within 14 days together with further and better details of the objections that have already been lodged.

    We make this request because the LOB does not clearly set out the grounds for objection and contains information that is not of relevance to the objections.

    We therefore ask that the Council be directed to supply further and better details of the objections in a clear and concise manner that can be responded to appropriately.

14 days is a reasonable time scale as the Council have already indicated the areas on which they reserved the right to lodge further objections and therefore they will have considered these areas and formulated the objections based on them.

III. The Applicants be given a reasonable time to respond to the objections having regard to their extent and number.

IV. Such other directions as will bring the matter to hearing as soon as possible.

4. However, if, which we dispute, the CRA decide to hear evidence as to whether the use is BR and not AOR as a preliminary issue, then we address Bristol City Council's objections, such as they are, as follows.

5. The history of the site section seeks to establish that the site was to be used for educational purposes and was originally acquired under the Education Act 1944. The details supplied also indicate that though consideration was given to the appropriation of the site for other uses at no time has such an appropriation be made.

6. It is clear, from the information up to page 11, that responsibility for the site was with a number of Council departments and committees. But throughout the relevant period the field was being used substantially as a playing field and recreation area by a variety of authorised and unauthorised parties.

7. The conclusion on page 11 of the LOB is merely a request for an initial determination on the issue of whether the field is being used BR or AOR. The Council appear to argue that the use is pursuant to a "statutory authority" and that this is an issue that can be determined based on submitted documentary evidence alone without oral evidence being presented. No conclusion is drawn for the previous 10 pages of historic data which is, therefore, of little or no relevance.

8. The Council then continue to present their arguments for why the use claimed in the application is not AOR but BR, and thereof outside the requirements of section 15(2) of the Commons Act 2006 ("the CA"). However, the Council present no clear argument as to why the use is BR.

9. We, the Applicants, therefore seek to establish that the use claimed is AOR and not BR by considering the relevant factors as determined in case law.

10. For the use to be as AOR is must have been carried out nec vi, nec clam, nec precario – without force, without secrecy and without permission – and the state of mind of the user is irrelevant: see R v Oxfordshire County Council and other, ex parte Sunningwell Parish Council House of Lords [1999].

11. The Applicant will seek to address each of these requirements taking into account the information in the LOB.

Response to the Council's Statement of Objections

Without secrecy

12. There is no way that that the use of the field as evidenced by the statements lodged in support of the application has been carried out in secret, and there is nothing anywhere in the LOB to support such a claim. Neither the statements in support of the application, nor the LOB, support an objection that the use was carried out in secret. There is, therefore, no issue on this point: the use cannot be other than AOR because of secret use. If the Council claim that there has been secrecy then they must submit evidence so that we can respond to it.

13. Our assertion on this point is supported by the Council themselves. The LOB refers to use of the field by people not specifically given permission, thereby indicating that that use by others could not have been in secret. The Applicants' statements lodged with the application contain hundreds of instances of non-secretive use.

Without force

14. For the use claimed by the application to be AOR it must have been carried out **without** the use of force. The Council appear to be arguing that the use has been **with** force and therefore cannot be AOR. They state, at page 15 paragraph 2:

> *Access to the land other than to permitted organised activities during this period appears to be by force due to the evidence of the broken fence*

15. In support of it's contention we assume they rely on the information contained in the LOB at:

- page 10, paragraph 7;
- page 14, paragraph 2 and the last sentence thereof;
- page 15, paragraph 1;
- page 20, paragraphs 1 and 2;

16. At these points reference is made to the field being fenced and that, where it abuts Wellington Hill, the fence "disappeared" and needed to be repaired.

17. From their own evidence (see letter referred to at page 16, last paragraph) by the 28th April 1980 the fence along side the public footpath on Wellington Hill had been removed and indication was given that its replacement would resolve a problem. In the statements supplied however it can be seen that the fence never was replaced and therefore since 1980 the field has been unfenced along its boundary with Wellington Hill. Therefore, all those who wished to gain access to the field since 1980 have been able to do so without the use of force. They have not even needed to open an unlocked gate or climb a style. Any use since 1980 has, therefore, been without force and continuous for over 30 years.

18. Further there are public footpaths crossing the field and there are entrances at 3 other points around the field. None of these have been obstructed by so much as an unlocked gate and are, therefore, public footpaths crossing the site. The

Council would have been obstructing such rights if they had gated the entrances so as to prevent access.

19. The statements lodged in support of the application evidence the lack of force in exercising the uses claimed.

20. The use has not been by force nor has it been contentious and therefore is not prevented from being AOR.

Without Permission

21. This appears to be the Council's main argument. They appear to say that the use is not AOR because permission has been given. That permission appears to have occurred because:

    - The field was acquired under the Education Act and its permitted and intended use was for educational purposes, which is what they claim it has been used for.

    - The Bristol Local Plan Written Statement adopted in 1997.

22. If the Education Act is considered to have the effect of granting permission then the extent of that permission needs to be considered. We argue that any permission that the Act may be considered to have granted would be within the scope of the Act and its purposes – namely, education.

23. The LOB states at page 13 that the land was "used as school playing fields from around 1959". At page 14 it states that it was used by "Ashley down Junior and Infants school for their sports days".

24. There is no doubt that the field was used by education establishments for educational purposes under the cover of the Education Act. Permission may have been formally or impliedly given for that. However, the question is whether the use described in this Application expressly or impliedly falls within that permission, otherwise it is without permission.

25. The statements lodged in support of the Application show that none of the parties claiming to have used the field are formal education establishments such as schools. Most are private individuals outside of the education system. The use for walking dogs is not within the scope of education and not exercised by permission granted by the Education Act.

26. Therefore, the Applicants further argue that if (which is not admitted) the Education Act is considered to have granted permission for the use of the field, that permission could only be for education purposes expressly authorised by the school or the Director of Education. The uses evidenced by the statements lodged in support of the Application are not uses for education purposes, and were not expressly authorised and, therefore, are not uses for which permission has been

granted under the Education Act. Permission has not therefore been given under the Education Act for the uses described in this application.

27. The LOB also states on page 15:

> *Permissive rights are also contained in the Bristol Local Plan Written Statement adopted in 1997*

28. No details are given of these Permissive Rights and no detail is given that they have been published in any way on the site. If the CRA is minded to find for the Council on this point, then the Council must be directed to file full details of the permissive right they say was granted, and the Applicants be given opportunity to respond.

29. The question then arises as to whether the mowing of the field and the erection of the goal posts may constitute an implied licence but the courts have rejected such arguments. We refer to the Beresford case.

30. Therefore, the use evidenced in support of this application has been without permission and as such has been use AOR.

The Merton Case

31. The Council seek to rely upon the recent case of *BDW Trading Ltd (t/a Barrett Homes) v Spooner representing the Merton Green Action Group & Merlin Homes Ltd* ("the Merton Case").

32. They state at page 21:-

> *Here land had been appropriated by the local authority for planning purposes then sold to Barrett- planning was granted and work duly commenced.*

33. This case has no relevance to the present application because its facts are completely different from the facts of this application. The current application can be distinguished from the Merton case because there has been no:-

- Appropriation;
- Sale;
- grant of planning permission, or;
- start of work.

34. The Merton case has no relevance to the present application.

35. We set out below paragraphs 7 and 8 of the Judgement given in the Merton case:

Response to the Council's Statement of Objections

7 *By Section 233 of the Town and Country Planning Act 1990 ("TCPA1990"), where any land has been acquired or appropriated by the Local Authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land (in such manner and subject to such conditions as appear to them to be expedient) in order to secure the best use of that land or to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area. It is not in dispute between the parties that the land in this case was disposed of under Section 233.*

8 *Section 241(1) TCPA 1990 provides that*

> *"Notwithstanding anything in any enactment relating to land which is or forms part of a common [which includes..... any town or village green], open space [which includes any land used for the purposes of public recreation] or fuel or field garden allotment or in any enactment by which the land is specially regulated, such land which has been acquired by a .... Local Authority .... under this Part or under Chapter V of Part 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 or compulsorily under any other enactment, or which has been appropriated by a Local Authority for planning purposes –*
>
> > *a) if it has been acquired by a Minister, may be used in any manner by him or on his behalf for any purpose for which he acquired the land; and*
> > *b) in any case, may be used by any person in any manner in accordance with planning permission.*

36. For section 241 to apply the land must have been acquired by one of 4 means:

    1. under that part of the Act or
    2. under Chapter V of Part 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 or
    3. compulsorily under any other enactment, or
    4. appropriated by a Local Authority for planning purposes

37. The Council argue that the purchase under the Educations Act falls within one of the above 4 categories, but this is false.

38. The land cannot have been acquired under the provisions of an Act that post dates the original acquisition unless there has been a subsequent appropriation – and the Council state there has been no such appropriation.

39. It was not acquired under Chapter V of Part 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

40. It was not compulsorily purchased.

Response to the Council's Statement of Objections

41. Finally, the Council's own LOB states that the land has not been appropriated.

42. Therefore, section 241 cannot apply.

43. Even if section 241 did apply, this would still not be sufficient for the Council's case, for the following reasons.

44. The Council argue that registration should not be granted as there is a possibility that a future planning permission may be granted, in which case the Merton case may apply. However, the Merton case would not apply because the Application for registration has already been lodged unlike in the Merton case. There would not then be an appropriation, sale, grant of planning permission and commencement of development that predates the application for a village green registration.

45. If their argument were accepted then no village green could be registered in respect of land owned by a local authority, because it would always be possible that the local authority might, in the future, appropriate the land, sell it, and then grant planning permission.

46. The Council state at paragraph 4, page 22, that it remains their intention to develop the land for educational use. This statement is completely at variance with their recent proposal to sell off the land for residential use.

47. We make no comment as to the effrontery of this claim, but merely state that the argument is improper at best. We ask you, Commons Registration Authority to note its insincerity when judging their case as a whole. The CRA should certainly not allow empty claims about educational use to be used as a mechanism to enable the Council to sell the land for profit.

48. At page 95 of the Council's own document, they state that one option would be for the development of the site for housing and indicate further that if the whole of the site were developed then 72 dwellings could be built on it. This statement also reveals the hollowness of the Council's claim that it "*remains the case to develop the land for educational purposes*". Can the Council please inform us specifically how housing constitutes educational use?

49. The Council argue at paragraph 5, page 22, that section 241(b) is triggered when planning permission is implemented. As the Applicants have already pointed out this section cannot apply because the Council have not acquired the land in one of the four ways which brings section 241 into operation. The only possible way that could apply would be if the Council were to appropriate the field for planning purposes in the future. They have clearly stated that their intention is to develop the land for educational use and therefore no appropriation is needed as that is the basis on which it is currently held under the Education Act. If the field therefore is to be used as stated then no appropriation is needed and therefore section 241 cannot apply.

50. If, however, the Council intend to change the authority under which they hold the land then an appropriation will be needed, in which case section 241 might come into play.

51. The Council are, therefore, seeking to object to the registration of the land as village green because they want to go through the process that took place in the Merton case in order then to defeat an application for registration. However, the application for the registration as village green has been made. Therefore, the Merton case facts do not apply. And it would be an abuse of procedure to reject this application simply in order to enable the Council to manufacture a situation in which the Merton can be made to apply.

Conclusion

52. The Council's case is not only without merit, it is in our submission disreputable. They seek to disguise their financial motives under general claims about "educational purposes". They seek to increase expense for the CRA, the Council itself, and the public purse, simply in order to create expense for the Applicants as a way to win tactically rather than on the merits.

53. We ask you to reject their request that a separate hearing be conducted hearing on the issue of whether the use of the playing field has been "by right" or "as of right". As we have shown, there is no merit to the Council's argument on this point and, in any event, a separate hearing on it would save no expense.

54. We respectfully ask you to refuse their request, and to direct:

    1. that the issue of whether the use is BR or AOR is not dealt with independently of the other issues but that all objections are heard together, and;

    2. that the Council file their other objections in full within 14 days together with further and better details of the objections that have already been lodged.